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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner.

JANUARY 30, 1986

QUESTIONS PRESENTED

1. Should the ripeness doctrine be applied to defer adjudicating the facial constitutionality of the provisions of the five-year old, fully implemented Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act")?

2. Are the powers assigned and the procedures established by the Act to regulate the conduct of federal judges consistent with the allocation of powers and procedures mandated by the Constitution to keep separate the powers of government and to guarantee that federal judges will have the independence necessary to enable the federal courts to maintain the proper separation?

3. Did the court of appeals correctly hold that a federal judge who has claimed that the Constitution guarantees

him the right to be free from the obligation to endure the burdens being imposed by the administrative proceedings being conducted against him under the Act must endure the burdens of the challenged proceedings before his claims will be ripe for adjudication?

4. Does the manner in which the Act has been implemented in the Eleventh Circuit and has been (and is being) applied in proceedings against the plaintiff federal judge irreparably and unconstitutionally interfere with his rights as a United States judge and as an individual?

PARTIES IN THE COURT OF APPEALS

The appellant in the court below and the petitioner here is the Honorable Alcee L. Hastings, a United States district judge in active service on the United States District Court for the Southern District of Florida. The appellees below

and respondents here are the Judicial Conference of the United States; the Honorable Warren E. Burger, Chief Justice of the United States; the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit; the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit; the Honorable Gerald Bard Tjoflat and the Honorable Frank M. Johnson, Jr., circuit judges in active service on the United States Court of Appeals for the Eleventh Circuit; the Honorable Sam C. Pointer (N.D. Ala.) and the Honorable William C. O'Kelley (N.D. Ga.), district judges in active service on district courts within the Eleventh Circuit; and the Attorney General of the United States, the Honorable William French Smith in the court below and the Honorable Edwin Meese III in this Court.

The Washington Legal Foundation filed a brief as amicus curiae in support of appellees in the court of appeals.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,
Respondents.

PETITION

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment that court entered against him.

OPINIONS BELOW

The opinion of the court of appeals is reported as Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), and is set out

in the appendix to this petition at A.1-84. The district court filed a memorandum opinion with its final order that is reported as Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984), and is set out in the appendix at A. 85-144.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 13, 1985 (A. 145). That court entered orders denying rehearing and rehearing en banc on November 1, 1985 (A. 147-49). The present petition was filed within the period specified by 28 U.S.C. § 2101 (c) (1982). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of

1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604(h)(1982). The provisions of that act are set out in the appendix at A. 159-85. The case also concerns the rules adopted by the Judicial Council of the Eleventh Circuit pursuant to the Act. Rule for the Conduct of Complaint Proceedings Under 28 U.S.C.A. § 372(c), published as Addendum III, Rules of the United States Court of Appeals for the Eleventh Circuit, at 28 U.S.C.A. Rules, 1985 Pocket Part at 282 (West). The provisions of those rules are set out in the appendix at A. 186-201.

Resolution of the constitutional questions presented would involve the following provisions of the Constitution of the United States: U.S. Const., art. I, § 1 (legislative powers), § 2, cl.5 (power of impeachment), § 3, cls. 6 and 7

(trial and judgments on impeachment), § 8, cl. 9 (inferior courts) and cl. 18 (necessary and proper); art. II, § 1, cl. 1 (executive power), § 2, cl. 2 (appointments), § 4 (impeachments); art. III, § 1 (tenure and compensation), § 2 (judicial power); amends. I (free speech and redress of grievances); V (due process). Those provisions are set out in the appendix at A. 152-58.

STATEMENT OF THE CASE

The Nature of the Action

This action challenges the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982), and of the manner in which it has been implemented and applied in one federal circuit.[1]

1. Unless otherwise needed for clarity, parallel citations to sections of the Act

The Act assigns the Judicial Conference of the United States (the "Conference"), the Chief Justice, and the judicial council and chief judge of each circuit power to investigate and sanction any United States judge whose conduct does not satisfy the norms they prescribe. Their exercise of these powers is subject to no check in any other branch, and their actions may not be reviewed by any court. The Act has been fully implemented, and these agencies and officers have exercised their assigned powers. This action was brought on behalf of one of the United States district judges against whom those powers are being exercised.

The Proceedings Below

Petitioner asked the district court to enter a judgment declaring that the Act

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as they have been codified in 28 U.S.C. (1982) will refer to the section number only [e.g., 28 U.S.C. § 372(c)(1) will be cited as "§ 372(c)(1)"].

is invalid on the ground that it improperly assigned legislative and executive powers to administrative officers and agencies of the judicial branch and combined legislative, executive, and adjudicative powers and authorized their exercise in a manner that could not be reconciled with the express provisions of the Constitution or the purposes for which those provisions were adopted (count one). In the alternative, petitioner asked the district court to enjoin the proceedings against him on the ground that the manner in which the Act had been implemented in the Eleventh Circuit and construed and applied in the proceedings against him was irreparably and impermissibly depriving him of fundamental constitutional rights guaranteed him as a federal judge and as an individual (count two).[2]

2. Petitioner asserted additional claims

The parties and the district court agreed that these claims should be initially raised by motions addressed to the court's jurisdiction and the merits. To that end, respondents filed a motion asking the court to dismiss the claims asserted in count one and certain of the claims asserted in count two on the ground that they were not ripe. Petitioner and respondents filed cross-motions seeking summary judgment on both those counts.[3]

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under the Constitution and under the Privacy Act of 1974, 5 U.S.C. § 552a (1982). He does not ask this Court to review the lower courts' dismissal of those claims.

3. A two-volume Preliminary Appendix was filed in support of Plaintiff's Motion for Summary Judgment: Counts I and II, Hastings v. Judicial Conference, No. 83-3850 (D.D.C. 1984). The Material Facts stated in this petition (infra at 9-33) are taken from documents included in that Preliminary Appendix and in the Appendix to Briefs and Supplemental Appendix filed in the court of appeals in Hastings v. Judicial Conference, No. 84-5576 (D.C. Cir. 1985).

The district court found the claims directed at the facial validity of the Act ripe for adjudication (A. 112-14).[4] The court entered a summary declaratory judgment adjudicating the Act constitutional (A. 114-40, 148-49). That court held, however, that the Act itself precluded the federal courts from exercising jurisdiction over any constitutional claims arising from the manner in which the Act was implemented or applied (A. 109-11). Accordingly, the district court dismissed petitioner's remaining constitutional claims with prejudice (A. 148-49).

The court of appeals vacated the district court's judgment (A. 145-46). That court held, sua sponte, that none of the claims directed at either the validity of the Act or the manner in which it had

4. Respondents did not appeal from that decision or argue that it was incorrect in the court of appeals.

been implemented and applied were ripe for adjudication (A. 4-5, 27-45). It remanded the case with instructions that these claims be dismissed without prejudice (A. 145-46). The present petition asks the Court to review that decision.

The Material Facts

The Act and Its Background

The Conference is composed of the Chief Justice and the chief judge and one district judge from each circuit. 28 U.S.C. § 331 (1982). Prior to the adoption of the Act, the Conference had adopted a Code of Judicial Conduct for United States Judges and had established an Advisory Committee on Judicial Activities to advise judges on extra-judicial activities and other conduct matters. Although the patterns varied, the councils, conferences, and offices of the chief judge in the several circuits had

also evolved into significant components of the judicial bureaucracy.

The Act expanded and formalized the already considerable powers of the Conference, the Chief Justice, and the judicial council and the chief judge of each circuit. The Act assigned the Conference final authority to review rules adopted and actions taken by the various circuit councils pursuant to the Act [Act § 4; § 331); authorized the Conference to establish and delegate its power to review circuit council actions to a standing committee (id.); and vested the sole power to appoint the members of that standing committee in the Chief Justice (id.). The Act required that the judges of each court of appeals reconstitute the judicial council for the circuit to add district judges as members [Act § 2(a); § 332(a)(1)]. Each reconstituted council

was authorized to adopt its own rules governing proceedings on complaints filed under the Act [Act § 3(a); § 372(c)(11)].

The specific powers assigned and the procedures established for their exercise against the individual judge are the central facts of this litigation. Under the Act, any person may file a complaint alleging that a circuit or district judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" within the judge's circuit [Act § 3(a); § 372(c)(1)]. The chief judge of the circuit has non-reviewable discretion to certify a complaint for investigation and to select and appoint the judges who will conduct the investigation [id.; § 372(c)(3), (c)(4), and (c)(10)].

The Act authorizes the special

committee so selected to conduct an investigation as extensive as the committee considers necessary and confers upon it the subpoena power [id.; § 372(c)(5) and (9)(A)]. Under the Act, the committee must file its report and recommendations with the circuit council [id.; § 372 (c)(5)]. Although the Act requires that the special committee afford the accused judge a hearing, the procedural and evidentiary rules for that hearing are largely unspecified [id.; § 372(c)(11)], and the accused judge has no right to have the scope or method of the investigative proceedings reviewed or limited prior to their completion [id.; § 372(c)(10)].

The Act empowers the circuit council to conduct further investigations or to vote without further action upon the sanction or sanctions to be imposed upon the judge against whom the complaint was

filed [Act § 3(a); § 372(c)(6)]. The Act does not specify any rights for the accused judge at this stage. It does not even require that he or she receive the report and recommendations of the special committee that investigated the complaint or be permitted to participate in any proceedings before the circuit council [id.; § 372(c)(5), (6)(C), and (II)(B)].

The Act authorizes the circuit council to offer the accused judge an unearned pension to induce him or her to accept retirement in order to avoid further harassment and expense and the prospect of public censure or an impeachment certification [id.; § 372(c)(6)(B)(iii)]. In the alternative, the council may publicly censure the judge or impose any other sanction that would not constitute a permanent removal from office

[id.; § 372(c)(6)(B)]. If the council determines, however, that the accused judge has engaged in conduct that might constitute grounds for impeachment, it must certify the record compiled and its determination to the Conference [id.; § 372(c)(7)(B)].

Under the Act, an aggrieved judge may not seek judicial review of any determinations made against him or her, and the Conference or its standing committee has discretion to deny the aggrieved judge any review at all [Act § 3(a); § 372(c)(10)]. If review is granted or the proceedings certified, the Conference or its standing committee may conduct further investigations into an accused judge's conduct and independently determine the sanctions to be imposed [id.; § 372(c)(6) and (8)].

The Act also authorizes the Conference to determine that an accused judge's

conduct may warrant impeachment and, upon such a determination, requires the Conference to transmit the record of its and the circuit council's proceedings to the House of Representatives with a certification that the Conference has determined that an impeachable offense may have been committed [id.; § 372(c)(8)]. The Act does not, however, specify any rights that the aggrieved judge shall have before the Conference or its standing committee [Act §§ 2(a), 3(a); §§ 331, 372(c)(8) and (c)(10)].

The Act vests power and discretion in the circuit councils and in the Conference, or its standing committee to determine whether any information shall be disclosed to the public and, if so, to determine the content of the disclosure [Act § 3(a); § 372(c)(14) and (c)(15)]. The Act vests power and discretion in the

chief judge of the circuit and in the Chief Justice, or the chairperson of the Conference's standing committee, to prohibit an accused judge from making any disclosures and thereby to deny the accused judge any right to disclose the complaint or to insist that proceedings against him be open to the public or that the records of those proceedings be disclosed to him or to the public [Act § 3(a); § 372(c)(14)].

The Act authorizes the payment from public funds of expenses incurred by a circuit council or special committee in investigating or disciplining an accused judge [Act § 5; § 604(h)(1)]. The Act makes no provisions, however, for payment of expenses incurred by an accused judge in asserting and protecting his or her rights as a United States judge or otherwise to protect the judge from the dimi-

nution of compensation that must result from such efforts.

These are the powers the Act assigned and the mechanisms and procedures it prescribed for their exercise that are relevant to a determination of the constitutional questions presented here. The manner in which the Act has been implemented and applied further illustrates the constitutional concerns and is material to the ripeness questions presented here.

Implementation of the Act

The Act became effective on October 1, 1981 (Act § 7). The Conference promptly created a Committee to Review Circuit Council Conduct and Disability Orders (the "Standing Committee") and delegated its powers to the Standing Committee. The Chief Justice appointed three senior judges as the members of the Standing Committee. The court of appeals for each

circuit reconstituted its council, and each adopted rules for proceedings under the Act. The composition of the councils and the rules adopted, however, differ significantly among the circuits.[5]

Each of the chief judges has exercised his assigned powers to pass upon complaints and appoint special committees to investigate complaints against judges serving in his circuit. Special committees have exercised their power to conduct investigations and recommend sanctions. At least two circuit councils have exercised their power to impose sanctions upon a federal judge. The Standing Committee

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5. The composition of the reconstituted councils is reported in Neisser, The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer, 65 Judicature 142 (1981). The rules adopted by each of the circuit councils are described, analyzed, and summarized in Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982).

has exercised its delegated power to consider and deny petitions for review.[6] The applications of these powers against United States District Judge Miles Lord and Alcee L. Hastings are merely the most highly publicized of the proceedings to date.

In less than three years, almost 400 complaints were filed under the Act. These complaints have named more than 570 Article III judges. More than 250 of those complaints were directed at conduct (as opposed to disability). The required statutory reports do not reflect the precise number of complaints that have been certified for investigation. The reports do disclose that some of these investigations have been completed and

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6. These facts are taken from the 1982, 1983, and 1984 Annual Report of the Director issued by the Administrative Office of the United States Courts.

that sanctions have been imposed. At least one judge has been induced to accept a "voluntary retirement" in exchange for an unearned pension to avoid further proceedings under the Act. As of June, 30, 1985, there were forty-six complaints still pending.

The Proceedings Against Judge Hastings

The Honorable Alcee L. Hastings is a United States District Judge in active service on the United States District Court for the Southern District of Florida. On December 29, 1981, attorneys for the executive branch filed an indictment that alleged that Judge Hastings had conspired to obtain a bribe in exchange for a specific judicial decision.[7] Judge

7. Judge Hastings promptly moved to dismiss the proceedings, claiming that the Constitution required that legislative impeachment and removal precede executive prosecution and judicial trial to chal-

Hastings was tried; he took the stand, testified, and was cross-examined. On February 4, 1983, the jury found him not guilty.[8] Judge Hastings promptly resumed the duties of his office.

Prior to Judge Hastings's acquittal the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals") reconstituted the Judicial Council for that circuit (the "Council") to include

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lenge a sitting federal judge's official acts. The designated district judge denied that motion, and Judge Hastings appealed. He requested that the judges of the court of appeals individually or en banc recuse or disqualify themselves from hearing the appeal, expressly calling to their attention the possibility of a conflict if subsequent proceedings were initiated against him under the Act. They refused, and that court affirmed the district court's decision. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982).

8. Thereafter, this Court denied his petition seeking review of the court of appeals's pre-trial decision. Hastings v. United States, 459 U.S. 1203 (1983)(cert. denied).

all judges in active service on the Court of Appeals with the minimum complement of three district judges. The Council adopted its Rule for the Conduct of Complaint Proceedings under 28 U.S.C.A. § 372(c), A. 186-201.

On March 17, 1983, six weeks after Judge Hastings had been acquitted, two of the three district-judge members of the Council, the chief judges of the United States District Courts for the Middle District of Florida and for the Southern District of Georgia, filed a complaint (the "Complaint") that asked that Judge Hastings be recommended for impeachment or otherwise sanctioned pursuant to the Act. These chief judges alleged that Judge Hastings had committed the crimes of which he had been acquitted and based their allegations upon an opinion written by Circuit Judge Frank M. Johnson, Jr.,

that affirmed the conviction of the alleged co-conspirator. The Complaint also alleged that the defendant Hastings had violated the standards of conduct to be expected of Judge Hastings when he had alleged that the Justice Department's decision to prosecute him had been politically or racially motivated and when he asked that the designated judge disqualify himself and included among the grounds a claim that that judge's long standing relationship with the Chief Justice who had designated him to hear the case raised reasonable questions concerning his impartiality.

The complaint further alleged that Judge Hastings had improperly permitted his office to be used to solicit funds for his defense and that Judge Hastings's testimony in his defense at trial had revealed other violations of the canons in

the Code of Judicial Conduct that the Conference had approved. The Complaint asked that the Council "make such orders as shall be necessary to vindicate the Honor of United States Judges and to discipline the Respondent for his odious behavior including, but not limited to, the making of a recommendation to the House of Representatives that Respondent be impeached . . . ."

On March 29, 1983, Chief Judge Godbold selected Circuit Judge Johnson to serve as a member of the special committee (the "Investigating Committee") that he appointed to investigate the facts and allegations set forth in the Complaint. The Investigating Committee retained John Doar, a New York lawyer publicly known for his work in the Watergate impeachment investigation, as its investigator and later as its chief counsel. Chief Judge

Godbold then issued a widely-reported news release announcing that the Investigating Committee had been appointed to investigate a complaint against Judge Hastings and had retained Mr. Doar as its investigator. Thereafter, the Administrator of the United States Courts denied Judge Hastings's request that it undertake to pay the costs and attorney's fees necessary to enable him to defend himself against the allegations of misconduct in office.

The Investigating Committee promptly petitioned Judge Hastings's court for access to all the records of the grand jury that had returned the indictment against him.[9]

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9. The judges of that court again recused themselves, and Chief Judge Godbold delegated his designation decision to the senior judge of the Court of Appeals who in turn certified to the Chief Justice the necessity for designating a judge from

After six months of defending himself in that and related litigation, Judge Hastings filed the complaint that initiated the present case.

The Investigating Committee initiated its formal proceedings while the present case was pending before the court of appeals. On April 2, 1985, the Investigating Committee sent notice to Judge Hastings that it would hold formal hearings in Atlanta, Georgia, commencing May 20, 1985. It was not until May 9, 1985, however, that the Investigating Committee sent Judge Hastings notice specifying the procedures that it would employ in

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another circuit. The Chief Justice acted, the designated judge granted the petition, and Judge Hastings appealed. A certificate of necessity again issued, and the Chief Justice assigned judges from three different circuits to hear the appeal. They affirmed. See In re Petition to Copy and Inspect Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd., 735 F.2d 1261 (11th Cir.), cert. denied, 105 S.Ct. 254 (1984).

those proceedings. In those notices the committee estimated that the presentation of its evidence would take at least ten days and advised Judge Hastings that the committee would not be bound by the rules of evidence. Neither notice gave any indication of the witnesses or other evidence the committee intended to present. The committee has since conducted three additional hearings pursuant to similar notices. Two were in Atlanta and one in Darlington, South Carolina. The hearings were held because the committee estimated it would need an additional seven days to present its own evidence.

In view of his constitutional challenge to the Act and the committee's proceedings, Judge Hastings filed a Special and Limited Appearance with the Investigating Committee reiterating his constitutional challenge to the commit-

tee's jurisdiction and advising it that he would not otherwise appear in the proceedings before it. He has not further appeared or participated.

The Investigating Committee has exercised its subpoena power extensively. Among those subpoenaed to appear during the first two-week set of hearings were Judge Hastings's secretary, one of his then and five of his former law clerks, and two of the lawyers who had represented him in the prior criminal proceedings. Judge Hastings's trial counsel, another of his former attorneys, and an investigator whom they had retained to assist them in preparing for his defense were among those subpoenaed to appear at the second Atlanta session. Throughout, the Investigating Committee has utilized the services of the Federal Bureau of Investigation to aid it in its investigations and to serve

its subpoenas.

Although much of the Investigating Committee's activity remains shrouded under the Act's cloak of secrecy, it is clear that the investigation now extends well beyond the allegations in any complaints filed against Judge Hastings. For example, it has sought and obtained records from Judge Hastings's banks spanning the period 1980 through 1985. It has also required the former mother-in-law to Judge Hastings's trial counsel and confidant to appear and testify even though she had informed its investigators that she had never met Judge Hastings.

The Investigating Committee's actions have removed the doubts that apparently troubled the court of appeals concerning the effect of the proceedings on Judge Hastings and the court on which he serves. Judge Hastings carries a full caseload on

the district court that has the heaviest docket in the nation. The bulk of his and his colleagues' time must be devoted to hearing serious criminal cases subject to the strictures of the Speedy Trial Act, 28 U.S.C. §§ 3161-74 (1982). To exercise the limited confrontational rights the committee thought his due, Judge Hastings would have had to set aside his docket and his other duties as a judge on that court for at least the 17 days of hearings that the committee has held thus far, apparently without even completing the presentation of its own case. Using the government's per diem allowances and published air tariffs, Judge Hastings would have had to expend almost $10,000 simply for transportation, room, and board for himself and two attorneys. He and those lawyers would have had to prepare for those hearings without prior knowledge of what witnesses

the committee intended to call, what documents it would use, or what rules of evidence it would apply. The financial and reputational burdens on Judge Hastings and the disruption to his docket and that of his court could be developed at length; in fact, they are irreparable because they are incalculable.

The Investigating Committee's actions have given rise to further litigation for which the Chief Justice has had to select the judges from outside the Eleventh Circuit who will preside and decide the issues raised. Judge Hastings, his secretary, and one of his then law clerks filed suit challenging the Investigating Committee's power to compel testimony from his present and former chambers staff. Williams v. Mercer, No. 85-1772-Civ. (S.D. Fla. filed May 20, 1985). Thereafter, the Investigating Committee filed seriatim

motions asking the Court of Appeals to exercise original jurisdiction to compel the appearance or testimony of the secretary and those of the law clerks and attorneys who objected and asserted judicial or attorney-client privilege as a ground for declining to appear or to answer its questions. Motions docketed sub nom., In the Matter of Complaints Filed Against United States District Judge Alcee L. Hastings, No. 85-2054 (11 Cir.).

The judge designated by the Chief Justice to hear the district court suit ruled that the Court of Appeals had exclusive jurisdiction and promptly dismissed the action for want of subject-matter jurisdiction. Williams v. Mercer (order entered May 24, 1985), appeal pending, No. 85-5420 (11 Cir.). The judges specially designated by the Chief Justice to hear the Investigating Com-

mittee's motions and the appeal ordered expedited briefing and heard argument in both cases on June 13, 1985. On September 5, the special panel issued an order requiring supplemental briefing in light of the decision of the court of appeals in this case. Both cases are now pending before the special panel.

REASONS WHY REVIEW SHOULD BE GRANTED

The substantive questions concerning the validity of the Act are fundamental. Their importance is apparent. They can only be resolved by this Court. The questions arising from the manner in which the Act has been applied against Judge Hastings are also fundamental. Their importance stems from and has been enhanced by the failure of any of the lower courts to consider the merits of those claims over the past three years. That failure has created legitimate concerns

about the ability to the judiciary to treat fairly when members of its establishment challenge a disfavored judge.

Moreover, the decision below will have an unintended consequence. It will interfere with and may preclude a proper adjudication of the issues concerning the Act's validity. Those are the factors that make it necessary that this Court grant review in this case. They are developed briefly below.

1. The court of appeals's application of the ripeness doctrine to avoid the constitutional questions in this case enhances the need for review by this Court. The questions concerning the facial constitutionality of the Act are among the most important that will ever come before this Court. Congress recognized that it was prescribing fundamental changes that were intended to alter the

operation of the federal court system and to limit the independence of the individual judge when it adopted the Act. None of the judicial officers and agencies who are parties here has ever suggested that the changes prescribed or the issues presented are less than fundamental. The opinion below acknowledged as much and the concurring opinion articulated the fundamental importance of those issues more eloquently than counsel for petitioner could here. These are issues that can only be resolved by this Court. They fully merit its consideration. In that light, the real issue presented by the petition is not whether the underlying questions will have to be resolved by this Court; rather it is whether the Court should grant review to provide the necessary resolution in this case.

The manner in which the Act has been

and is being implemented and applied in the proceedings against Judge Hastings also poses questions that are crucial. The basic question is apparent: Does the Constitution impose any enforceable checks upon the manner in which administrative officers and agencies of the judicial branch may exercise the powers assigned them by the Act against the individual judge? Throughout the litigation involving Judge Hastings, there has also been an equally important but less apparent issue. Any fair view of the decisions and opinions in Hastings cases raises the tacit question: Will the courts enforce the Constitution to provide any meaningful protection for an individual judge who has fallen into disfavor with those of his judicial colleagues who hold the powers of the judicial establishment?

The concurring opinion below noted

this concern and articulated its importance:

> In our haste to assail Judge Hastings outside of the constitutionally prescribed impeachment process, we seemingly have lost sight of Hamilton's words. In our zeal for efficiency and moral purity in the judicial ranks, we may be indulging a cavalier assumption that the independence of the judiciary will not suffer from "minor" legislative encroachments. Our self-righteous finger-pointing at Judge Hastings may blind us to the reality that this case has more to do with the potential diminution of the independence of the judiciary than with the alleged misconduct of an individual judge. If Judge Hastings can be made to answer, outside of the criminal and impeachment processes, for judicially-related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence.

A. 52-53.

Against this background petitioner

submits that the decision of the court of appeals is likely to have two consequences that enhance the need for review by this Court in this case. First, the effect of the panel decision will be to transfer the underlying issues directly presented in this case to another court in which they are not directly presented and are likely to be lost amidst a morass of collateral issues concerning the original jurisdiction of the courts of appeals and the standing of Judge Hastings's law clerks and former lawyers to raise these issues in subpoena enforcement proceedings. If the issues are not lost, they are likely to be fragmented and decided upon a hastily assembled record that can only frustrate proper adjudication and review. See infra at 40-46.

Second, the sua sponte application of the ripeness doctrine by the court of

appeals and its unintended effect can only reinforce the concern that judicial self-righteousness and "zeal for efficiency and moral purity" have again made the Hastings cases the kind of "hard cases" that make "bad law". The absence of briefing and argument led the panel to apply the ripeness doctrine in a manner that conflicts with every recent application of that doctrine by this Court and with the policies requiring prompt adjudication of constitutional issues such as those presented here that those decisions here intended to establish and promote. See infra at 46-58. The decision below must thus further reinforce the concern that the courts are evading, rather than avoiding, these issues until Judge Hastings has been dealt with.

The presence of that concern enhances the need for this Court to grant review so

that it may consider the ripeness questions in light of the concerns and the potential consequences of the decision below. The potential consequences enhance the need for prompt review so that the Court may properly consider and resolve the substantive constitutional questions before they are lost or fragmented.

2. The decision below is likely to preclude a full and proper adjudication of the constitutionality of the Act. Judge Hastings filed his complaint in the only court in which all parties necessary and proper to a full adjudication of his claims could be joined in a single action and in which the issues could be decided by judges who had not been specially designated for the task by one of the proper parties-defendant. Respondents tacitly acknowledged the need for such a forum by waiving any objections to in

personam jurisdiction or venue. The district court, with ironic foresight, declined to apply the ripeness doctrine in part because "Principles of judicial economy also counsel against piecemeal adjudication of Judge Hastings's broad complaint, directed as it is to all aspects of the Act." A. 114.

If review is not granted, the decision below will have the unintended consequence of converting what ought to have been an orderly adjudication of fundamental claims in a proper forum into a potential inter-circuit shell-game in which the victim must guess under which procedural shell the constitutional pea is hidden at peril of losing his right to have the merits decided at all should he guess wrong. Moreover, it will not only disrupt the judicial economy, it will also dramatically enhance the economic burdens

imposed upon the only United States judge and party whose costs and fees in these and all related proceedings are not being borne by the federal treasury.

On September 5, 1985, the special panel designated to sit as the Court of Appeals to decide In the Matter of Complaints and Williams v. Mercer requested supplemental briefing in light of the decision below. In response, Judge Hastings filed a motion for limited intervention solely for purposes of asserting the judicial and attorney-client privileges. By that motion, he sought to remove any questions concerning his former clerks' and attorneys' standing to object to the enforcement of the subpoenas. That motion was denied. The Justice Department filed a motion to intervene in support of the Act. That motion was granted.

Based upon the briefing now before

it, the special panel court must now determine:

1. Did the Act grant the courts of appeals original jurisdiction to enforce committee and council subpoenas and implicitly deprive the district courts of subject-matter jurisdiction over related claims arising under the Constitution and laws of the United States?

2. If so, did Congress also intend to grant the courts of appeals nationwide in personam jurisdiction without regard to where the subpoenaed person was served or resides? [9]

3. If so, does the Due Process clause permit the Act to be construed as a grant of nationwide jurisdiction and venue

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9. See, e.g., United States v. Hill, 694 F.2d 258 (D.C. Cir. 1982)(for an analysis of the kinds of issues the special panel must address and resolve).

to each court of appeals? [10]

4. If so, do a federal judge's law clerks or lawyers have standing to assert a judicial or the attorney-client privileges.

5. If so, are conversations between a federal judge and his or her law clerks privilege?

6. If so, have the privileges that protect Judge Hastings's communications with his lawyers or with his law clerks been waived and, if so, to what extent?

7. If these privileges have not been fully waived, does the Act override or limit either of those privileges and, if so, to what extent?

8. To the extent that these privileges have not been abrogated by

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10. See Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 Nw. U.L. Rev. 1 (1984) (and authorities collected therein)(for a recent analysis of the issue).

the Act, do a judge's law clerks or former lawyers have standing to raise any constitutional issues concerning the validity or application of the Act in subpoena enforcement proceedings? [11]

9. If so, which specific constitutional issues would have to be decided before the subpoenas could be enforced?

10. Which of those specific issues are ripe for adjudication on the limited record before the special panel?

11. How should those specific constitutional issues be resolved?

If this court does not grant review here, after the special panel decides the

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11. See, e.g., FAIC Securities, Inc. v. United States, 768 F.2d 352 (C.C. Cir. 1985)(for an analysis of the kinds of issues the special panel must address and resolve).

cases before it, either this Court or the district court below will then have to confront the collateral effect of that decision upon the claims that were properly and initially asserted here and, widen the decision below, must now be asserted again.

The scenario portrayed is real; it is not consistent with sound judicial policy; and it is not fair -- to petitioner, to the courts and the judges who serve on them, or to the Constitution. This Court should grant review to avoid the unnecessary and disruptive consequences that will otherwise be caused by the decision below.

3. The decision below conflicts with established precedent and policy controlling the application of ripeness doctrine. It is clear that the ripeness doctrine did not compel the result reached by the court

of appeals. In the district court, Judge Hastings sought a declaratory judgment that the fully implemented Act could not withstand a facial comparison with the Constitution as it had been implemented and applied. This Court's "pre-enforcement" decision clearly indicate that the issues raised by that claim became ripe and fell within the class of issues that warrant prompt adjudication as soon as the Act had become effective and had been implemented. The fact that the Act had been applied against Judge Hastings was material to that claim only because it eliminated any questions concerning the plaintiff's standing and the adversity of the interests he asserted against the defendants.

The Court has articulated and consistently applied a two-prong test in determining ripeness questions. "The

problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of witholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Applying that test, the Court has consistently held that interests less substantial than the Nation's interest in avoiding the imposition of unconstitutional burdens on its federal judges were sufficient to require prompt adjudication of facial challenges to statutory and regulatory provisions whose meaning and application were far less certain than the provisions challenged here. The regulatory burdens that would be imposed upon "reputation sensitive" drug manufacturers required prompt adjudication of the facial validity of the challenged regulations in Abbott Laboratories, 387 U.S. at 148-53.

The interests of railroad creditors and shareholders required early adjudication of the constitutionality of the statutory blueprint for the reorganization of several of the Nation's railroads in the Regional Rail Reorganization Act Cases, 419 U.S. 102, 122-25 (1974), notwithstanding the absence of a record that might have made it possible to avoid some of those issues and the presence of statutorily prescribed procedures assuring prompt post-application judicial review, id. The interests of political candidates and their supporters required prompt adjudication of the constitutionality of the amended federal election campaign laws in Buckley v. Valeo, 424 U.S. 1, 113-18 (1976), even though the election commission had yet to take any enforcement action, id. The interests of environmentalists and the nuclear industry were

sufficient to require prompt adjudication of the constitutionality of statutory limits on nuclear liability in Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 81-82 (1978), even though the Court deemed remote the probability that injury subject to those limits would ever occur, id. See also 4 Davis, Administrative Law Treatise, § 25:8 (2d ed. 1983).

This case was neither a pre-implementation nor a pre-enforcement challenge. The principal claims asserted are fixed and subject to no contingencies: neither petitioner nor the respondents can amend the Act or the Constitution. The Nation's interests in protecting the independence of its federal courts is at least as great as its interests in protecting the financial stability of its railroads, of its political campaigns, and of its nuclear

industry. The decision below conflicts with this Court's precedents and with the policies they establish.

The decision below also seems inconsistent with this Court's recognition that ". . . our Constitution . . . commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 60 (1982). The decision also seems inconsistent with the Court's application of the command and the protections to invalidate provisions of the Bankruptcy Reform Act on the ground the bankruptcy judges subject to circuit council regulation during their fixed terms as well as to federal statutes governing the salary of all federal civil servants lacked the constitutionally

mandated independence necessary to adjudicate common law contract claims. Id. at 59 n.10, 60-61; see also id. at 89-90 (Rehnquist, J. concurring).

The decision that petitioner must further endure the burdens of the Investigating Committee's proceedings similarly conflicts with established precedent and policy. See, e.g., Public Utilities Commission of California v. United States, 355 U.S. 534, 539-40 (1958) (claims ripe where the only question is whether it is constitutional to fasten administrative proceeding onto litigant and judicial intervention is the only effective way of protecting the constitutional right involved); cf. United Public Workers v. Mitchell, 330 U.S. 75, 91-94 (1948) (constitutional challenges to Hatch Act asserted by the one civil servant against

whom administrative proceedings had been initiated were ripe required prompt adjudication). Indeed, the only two courts of appeals to consider the issue have recognized that a federal administrative proceedings had been initiated were ripe and required prompt adjudication). Indeed, the only two courts of appeals to consider the issue have recognized that a federal judge's claim that the Constitution guarantees him the right not to be subject to a proceeding is a right that "would be wholly deprived of meaning" if he were forced to undergo the proceedings before he could assert it. United States v. Hastings, 681 F.2d 706, 708-09 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); United States v. Claiborne, 727 F.2d 842, 844 (9th Cir.), cert. denied, 105 S.Ct. 113 (1984).

The court of appeals misperceived the

nature of the claims asserted and conflated concepts of ripeness, administrative exhaustion, and judicial deference in reaching its conclusions. The claims directed at facial validity were not dependent upon contingent outcomes or possible sanctions: They sought declatory judgment that the assignment the investigative and appointment powers made by the Act and the specific combinations of the assigned legislative, executive, and adjudicative powers that the Act prescribed conflicted with the constitutional allocation of those powers. Cf. Steffel v. Thompson, 415 U.S. 452 (1974). The threat of a Sword of Damocles is that it hangs; the threat of the Act is that it exists.

Similarly, the claims directed at the manner in which the Act had been implemented and applied were largely indepen-

dent of outcomes and possible sanctions. The central claims alleged that an improperly constituted and impermissibly biased tribunal was conducting an impermissibly broad and unfair investigation that was causing irreparable financial and reputational injury to a United States judge. The nature of that injury was and remains apparent. Judges are engaged in a reputation sensitive injury. Chief Judge Godbold's unilateral news release, the litigation initiated by the Investigating Committee, the service of subpoenas on the judge's clerks, lawyers, friends, banks, and other members of his community constitutes on-going injury. The lower court's conclusion that petitioner had not and could not show irreparable injury is belied by the concurring opinion's acknowledgment of the apparent financial burdens the proceedings have imposed.

The Supplemental Appendix filed in that court made it clear that the Investigating Committee is proceeding in cavalier disregard of the fact that Judge Hastings is a judge in active service on the district court with the heaviest docket in the nation. The injury is not only to Judge Hastings, but also to that court and the litigants who appear before it.

Nonetheless, the court correctly noted that certain of petitioner's claims might be clarified and made more concrete by the Investigating Committee's actions. The events that occurred while the appeal was pending have provided that clarification and should now be considered. See, e.g., Buckley v. Valeo, 424 U.S. at 114-17. For example, the district court upheld the facial validity of the Act in the face of plaintiff's due process claims

by finding certain rights implicit in the Act. A. 136-37. The procedure the Investigating Committee prescribed for its hearings, its use of seriatim hearings, the ever-expanding scope of its investigation and its use of executive agents, the use of the subpoena power to override all claims of privilege and to probe areas of Judge Hastings's personal background with no apparent relevance to his conduct in office, and the failure to consider the demands of his office do not demonstrate the "sensitivity to the procedural rights of judges under inquiry" that the district court found implicit in the Act. Id. at A. 139.

The fact that the Investigating Committee exercised its powers while the appeal was pending in a manner that rejected the construction that the district court below thought necessary

to uphold the Act's facial validity bears upon the constitutionality of the manner in which the Act is being applied. The ripeness of the claims stemming from that application should now be considered on a record that reflects these events.

CONCLUSION

Petitioner is a United States judge. That was a decision made by a prior President with the consent of a prior Senate. In theory, petitioner's compensation may not be diminished while he remains a judge, and, in theory, he will remain a judge unless and until he is impeached and removed from office by action of the two houses of Congress. In reality, petitioner's compensation has been substantially diminished, and his ability to function as a judge has been significantly undermined for the past four years.

It may be that the Court will decide that the Act is necessary and proper, but those questions are fairly debatable. See, e.g., Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117 (1985). It may be that the Court will decide that the manner in which the Act has been applied against petitioner is proper. But that too raises fairly debatable questions.

Petitioner submits, however, that need for prompt and final resolution of these questions is not fairly debatable. Neither the holders nor the objects of the powers assigned by the Act should have to function in an arena of constitutional uncertainty, and nor should Congress. Only this Court can provide the necessary resolution. Petitioner submits it should do so in this case. Accordingly, he asks

that the petition be granted.

Respectfully submitted,

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